LAND USE CONSULTATIONS ADVANCING THERAPEUTIC JURISPRUDENCE: RIPE FOR CLINICAL TRIALS

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I. INTRODUCTION

Zoning matters produce a high volume of “disputants” who align within two camps, and leave a third group of persons who are apathetic and disengaged in the short term, even though development or use implementation affects its interests, making its constituents stakeholder in the ultimate results.1 Zoning is a legislative—hence political—process replete with behind-the-scenes negotiations and deal-making between leaders and developers.2 Leaders of local governments are charged with securing competing goals: to protect property owners against the potential erosion of wealth and health caused by ongoing development, and to promote the entire

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1 In truth, there is still more complication. The community planning function includes the town’s preparation of a master or “general” plan, which is the town’s visionary statement for future development. In many jurisdictions, citizens’ committees must vet the master plan periodically, followed by the town’s planning commission, and then finally, its chief legislative body. That is a circus that can consume years of meetings and features broad spectra of stakeholders with shifting agendas as the master plan develops. See Michael N. Widener, Moderating Citizen ‘Visioning’ in Town Comprehensive Planning: Deliberative Dialog Processes, 59 WAYNE L. REV. 29, 34–8 (2013); see also City of Phoenix Planning & Development Department, UpdatePDD, CITY OF PHX., 4 (Feb. 2016) https://www.phoenix.gov/pddsite/Documents/Newsletter%201.15.pdf (inviting public participation in the next General Plan iteration; copy in possession of law journal).

2 See Erin Ryan, Note, Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts, 7 HARV. NEGOT. L. REV. 337, 339, 348–52 (2002). Zoning adjustment, by contrast, is a multi-step process in most instances of contested requests for relief; but these are quasi-judicial proceedings sometimes stripping out lobbying’s impacts from the process. See Michael N. Widener, Curbside Service: Community Land Use Catalyst to Neighboring Flowering during Transit Installations, 45 URB. L. REV. 407, 437–39 (2013). Zoning adjustment processes likely are the “low hanging fruit” sources for land use neutral service, as they are less legally complicated cases with the fewest average number of disputants; but see infra text accompanying note 59.
town’s economic efficiency and growth in the name of competitiveness—sometimes this is described as balancing local aesthetics with local finances. This balance is delicate and difficult to achieve. As a result, land use hearing outcomes can be tortured, and their explanations incredible or irrational on the surface, expressing “naked preferences,” in which the raw exercise of political power substitutes for general justification or broader public value.3

In therapeutic jurisprudence, the practitioner’s inquiry is whether the social force known amorphously as “the law” produces therapeutic or non-therapeutic consequences.4 Professor Daicoff explains that this analytical approach plumbs the effects of laws and legal rules, and processes and participants, on an individual’s well-being, relationships, and behavioral functions.5 Many land use decisions, stemming from a legal procedure (one or more public hearings on a general plan or specific entitlement matter) that baffle or raise feelings of marginalization, are viewed by some stakeholders as products of administrative deceit or public corruption,6 and these processes and rule-playing strategies are non-therapeutic. Among the bases for an unhealthful response is a feeling that

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3 Ryan, supra note 2, at 337; see also Marco Putz, Power, scale and Ikea: analysing urban sprawl and land use planning in the metropolitan region of Munich, Germany, 14 PROCEDIA SOC. & BEHAV’L SCI. 177, 179-83 (2011).

4 See generally David Wexler, Therapeutic Jurisprudence: An Overview, 17 T.M. COOLEY L. REV. 125 (2000). A longer introduction to this movement’s history and principles, including the basic insight that law is a social force producing consequences, is found in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 7, 471 (Dennis P. Stolle, David B. Wexler & Bruce J. Winick eds., 2000).


the “deck is stacked” against the unsuccessful party, who often is not well informed or financed, feels manipulated by the successful party’s agents’ public statements or assurances, and feels unrepresented in the process by elected and appointed officials in her jurisdiction. The resulting state of the public’s health in controversies touching on local entitlement processes is well summarized by Susskind and Field:

> We all need to be concerned about a society in which the public’s concerns, fears and anger are not adequately addressed. When corporate and government agencies must spend crucial time and resources on rehashing and defending each decision they make, a frustrated and angry public contributes to the erosion of confidence in our basic institutions and undermines our competitiveness in the international marketplace.

This paper proposes educating law students in the processes of therapeutic justice through service as a neutral in land use controversies, and in the process, improving law student dispute resolution skills and enabling them to promote therapeutic outcomes.

## II. Zoning Processes’ Therapeutic Successes and Failings

The legislative act of zoning is subject to judicial review, but the standard of review seldom results in the reversal of legislative conduct. Courts examine due process claims against zoning ordinances, like other legislation affecting property rights, under a...
loose “reasonableness” standard, in which the purpose of the challenged legislation is presumed valid, and a reviewing court evaluates if the means employed are reasonably calculated to achieve the stated purpose.\textsuperscript{10} In practice, this test accords great deference to legislative judgments, because the link between the means and the purpose of the legislation is satisfied by almost any conceivable rational basis, disregarding whether the “explanation” offered was the actual basis for legislative action.\textsuperscript{11} The court asks only whether a rational relationship exists between the ordinances passed and a conceivable legitimate governmental purpose or objective.\textsuperscript{12} Moreover, zoning codes are sufficiently ambiguous such that a legislative body can either approve or reject a vast majority of entitlement applications with impunity, acting in either direction on seemingly reasoned grounds, while maintaining a plausible interpretation of the existing town’s ordinance’s text.\textsuperscript{13}

Judicial deference renders it difficult to reverse abuses of the town’s zoning power, so communities at times become substantially divided over that power’s exercise. Since (a) modifying a zoning map to introduce new types of use benefits only non-residents (i.e., potential future occupants), and (b) adhering to “locals-only democracy” norms, non-residents lack a voice in the discussion, a proposed entitlement engages few, if any, genuinely local supporters.\textsuperscript{14} Meanwhile, when local (incumbent) residents seemingly will not benefit directly from the entitlement proposal, these residents form either (i) an opponent’s group, among those to whom the proposed zoning change seems disadvantageous, or (ii) a disinterested group, whose members do not share the opponents’ views or are simply apathetic.\textsuperscript{15}


\textsuperscript{12} See id.

\textsuperscript{13} See id.


\textsuperscript{15} See id.
The opponent’s group often becomes strident, or even irrational, about the proposed modification, unless they become better informed, fearing change in the familiar, if segregated, homogeneous neighborhoods that they occupy. In any case, those loudest voices in a debate invariably oppose the initiative, as proponents usually are not current residents “invested” in the surrounding property. Even if opponents constitute a small minority of all neighborhood dwellers, because its real majority, more often than not, is disinterested, a few opponents may stymie an initiative, exercising “veto power.” This inclination has exceptions, such as when neighbors are poor and lack influence, but face politically influential developers who want a zoning change, or where project leaders induce local residents to dial down their opposition in exchange for the developer’s creating or improving public parks, plazas, or other amenities.

It is difficult to contend with the rugged zoning entitlement process. Frequently, what statutes or municipal ordinances require affords little opponent stakeholders’ organization; while neighbors may testify during public comment periods, these moments do not result in constructive dialog. Frequently, developers cannot or will not change proposals to meet neighbors’ needs, due to the substantial up-front costs of the municipal or county site-planning exercise. In ensuing discussions, stakeholders withhold key information from one another either to preserve the “element of surprise” at the hearing, or due to anxieties of being exploited. The public forum dissolves into a “stage” upon which actors deliver monologues, instead of engaging in useful dialogue for decision-makers to absorb and process. Public testimony degenerates into political positioning, preparation for legal challenges, or merely grist for ongoing grievances between the developer and neigh-

17 See Vallée, supra note 14.
18 See id.; Michael Lewyn, Against the Neighborhood Veto, 44 REAL EST. L. J. 82, 82 (2015).
19 See Vallée, supra note 14.
21 See id.
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bors.24 Once a conflict proceeds to court, litigants advance in many instances without attempts at negotiation of mutually satisfactory solutions beforehand.25

In the worst excesses of incivility, the stakeholders sort into vociferous, emotionally-charged factions, clamoring for greater voice in the hearing process and raising issues unrelated to the immediate land use issue (expressing other objections to the applicant developer, developers in general, or the town notice and hearing process), while communicating stridently to their leaderships whose ox is to be fattened—or gored—through granting or denying a rezoning or zoning adjustment request.26 When a matter becomes especially emotionally charged, these factions become increasingly antagonistic, inclined to see the process as binary, leading to “zero sum outcomes.”27 In the illustrations of positional attitudes below (extracted from the author’s personal experiences, both in presenting and adjudicating zoning matters), the two active disputant camps are designated “opponents” and “proponents” for convenience’s sake. Of course, these attitudes often arise at the inception of an application for zoning change or another entitlement process and carry forward, unwaveringly, throughout that process.

III. ZONING STAKEHOLDER DISPARATE ATTITUDES IN CONFLICT

The following is a synopsis of “position statements,” undergirded by negative attitudes and suspicion, articulated by opposing camps in land use entitlement application cycles.

24 See Nolon, supra note 20, at 8.
25 See id. (citing Patrick Field, Kate Harvey & Matt Strassberg, Integrating Mediation into Land Use Decision Making (Lincoln Inst. of L. Pol’y, Working Paper WP09PF1, 2009)) (stating that Vermont land use court assesses before formal adjudication whether mediation would serve a useful purpose).
26 See Nolon, supra note 20, at 8 (“Communities often become embroiled in battles that tear at the civic fabric, pit neighbor against neighbor, demonize the applicant, and wear down local officials.”).
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A. Stage One: Pre-hearing

Proponents’ World-View of opponents’ camp:

Why can you [opponents] not grasp the simple realities that (a) vacant property is supposed to be developed, and (b) the town’s tax base grows from developing property?

Why do you believe that an entire project is pre-planned (in final form) from the inception of a development concept?

Why do you assume your property holdings will lose value as a direct result of the development? Might not your property values actually increase as a result of the proposed development?

Opponents’ World-View of proponents’ camp:

How could you think of putting this project in my neighborhood? (Neighbors’ prior or better entitlement.)

How could you move forward with any project in my neighborhood without receiving my input and reacting to it first?

28 Cf. Patrick Devine-Wright, Explaining “NIMBY” Objections to a Power Line: The Role of Personal, Place Attachment and Project-Related Factors, 45 ENV’T & BEHAV. 761, 764 (2013) (explaining the role of place attachment in citizen resistance to siting of unwanted land uses deemed disruptive to emotional bonds and threatening to place-related identities). Residents of neighborhoods express their identity spatially by their use of space and sometimes by creating an architectural vernacular. See Lynn C. Manzo & Douglas D. Perkins, Finding Common Ground: The Importance of Place Attachment to Community Participation and Planning, 20 J. PLAN. LIT. 335, 338 (2006). These behaviors contribute to a sense of community and additional personal and corporate attachments to place. See id. That’s why, sometimes, changes to a neighborhood by new development are resisted—because change signals erasure of a segment of a particular cultural history and identity. See id. These sorts of things can be expressed by community members in mediations and other forms of consultation; but it is difficult to vent such concepts to officials in a public hearing in a few moments of available time. See Lewyn, supra note 18, at 90. Through consultation, entrenched opposition may yield up feelings about place attachment that lie at the root of negative reactions, moving a community toward consensus or another conflict resolution. See Manzo & Perkins, supra note 28, at 347. However, implying that environmental psychology is the leading determinant of opposition to zoning changes is disingenuous; for example, Bradley Karkkainen asserts that a neighborhood resident purchases a portion of the neighborhood infrastructure—those community owned assets like public schools, recreational and transportation facilities; and the potential compromise of those assets seems threatening. See Bradley Karkkainen, Zoning: A Reply to the Critics, 10 J. LAND USE & ENVTL. L. 45, 69 (1994). At other times, baser instincts of neighbors surface, such as fundamental disrespect for developers and their work, aesthetic objections to a particular project’s design or function (accompanied by the desire to control it/them), or merely neighbors’ wishes not to endure the disturbance of even a temporary construction period. See id. at 72–73.
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Why do you think you can diminish my property value while you get rich? (Zero-sum reaction.)

B. Stage Two: In-Hearing Process

Proponents’ World-View of opponents’ camp:

We gave the precise notice to the neighbors that the ordinance says we must give of the project’s applications for approval.

This is the optimal project in its surroundings’ context; why can you not understand it, and react reasonably?

Since nothing we would offer you will make you happy, we may as well take our chances under the [city’s entitlement processes] without compromising with the opponents.

Opponents’ World-View of proponents’ camp:

Why do you not give us substantial advance notice of the time and place of public hearings? Do you hope to exclude us from the conversations?

Why will you not (a) meet with us in person, (b) listen thoughtfully to our critique and inputs and incorporate them into your project, and (c) modify your project to suit neighbors’ needs, tastes, and preferences?

Why can you not explain your project so that it makes sense to us and addresses our concerns?

Why must your project diminish our property values? (Zero-sum conviction.)

C. Stage Three: Post Hearing and Appeals

Proponents’ World-View:

29 See Lewyn, supra note 18, at 90.
You have cost us substantial amounts and lost time for development because of your protests, so our only recourse is to build our project, and put all this behind us (assuming proponents won at the ultimate public hearing).

You have cost us substantial amounts because of your protests, and our only recourse is to file a lawsuit to contest the city’s decision—an even further expense and time-waster (assuming the proponents lost).

Our project is diminished in quality and value because of compromises in scope and other accommodations you extracted from us; now our [lost opportunities mount] [profit margin is reduced] [investor base has shrunk].

Opponents’ World-View:

We have to put up with noise and dust during construction and then look at your lousy project while you take your profit and leave our area permanently, or at least until your next lousy project is developed nearby.

Our voices were not heard/we have no voice in these proceedings; my elected officials did not represent me as they should (sense of alienation).

The zoning process is rigged in favor of developer interests (loss of trust), or, the zoning process is an arbitrary system neither guided

30 See id. at 92 (noting the developer’s construction loan payments may be ongoing during neighbor protests in the entitlements process).
31 This sentiment is widespread. See Matt Leighninger, Three Minutes at the Microphone: How Outdated Citizen Participation Laws are Corroding American Democracy, in MAKING PUBLIC PARTICIPATION LEGAL 3–5 (Working Group on Legal Frameworks for Public Participation ed., 2013). This compilation of the Working Group on Legal Frameworks for Public Participation was published by the National Civic League, National Coalition for Dialogue and Deliberation, International Association for Public Participation, the American Bar Association and various other contributors. The report finds that the dominant model of public engagement in the United States is a “public comment period” allowing each speaker approximately three minutes at the microphone to make a statement, allowing for limited interaction with elected officials. As an alternative to this “default”—and ineffective—model for engaging people in governance, the report recommends dialogue and deliberation in small groups, and proposes a model city ordinance and state law to require more interactivity engaging citizens in public meetings, and advocates such provisions’ insertion of ordinances governing land use and transportation planning. See id. at 18. Of course, not all cities have curtailed public input and participation; for instance, New York City by ordinance has augmented neighborhood power in development processes, although not through the device of face-to-face consultations among stakeholders. Cf. Lewyn, supra note 18, at 84.
or much influenced by the affected public’s interest (disillusionment).

Who will reimburse us for losses in our property value or restore our compromised community infrastructure?

Our only recourse now is to file a lawsuit to contest the city’s decision—an even further expense and time-waster with no certain likelihood of a good outcome.

The angry stakeholder’s perspective, jaundiced by non-therapeutic reactions, must be heard by those seeking peacemaking through legal processes. Calming passions, and facilitating the give and take of negotiating in legal processes spares no corner of the legal realm. The challenge for a lawyer injecting therapeutic jurisprudence into land use consultations is to engage citizens and developer representatives, however haltingly, in a “democratic outlet for . . . deep passions,” into one “forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight.” Students are well-served by learning negotiation dynamics and empathy among their practice-ready skills, in the manner suggested below.

IV. PROPOSAL FOR A LAND USE MEDIATION CLINIC

Land use is a noteworthy “street law” subject based upon the number of potential stakeholders engaged in a general plan or zoning entitlement process and the magnitude of passions generated, especially when values collide. Depending upon the scope of the project, a handful or a hundred citizens can become engaged, at varying levels of interest and, at times, acting at cross-purposes. The most vocal and passionate citizens, if also thoughtful and well-organized, are worthy opponents of the most well-conceived development plan. Too often, however, zoning cases become soap-operatic, featuring dramatic presentations at public hearings that ignore, or altogether replace, merits within the opposing perspec-

34 See SUSSKIND & FIELD, supra note 7, at 153.
tive(s). Sometimes opponents are merely grandstanding or promoting agendas besides expressing opposition, such as future office-seeking. Law students, with some basic knowledge of land use law and mediation approaches to land use controversies, can serve a valuable role in educating lay public stakeholders before a zoning public hearing process ensues. But, they can also facilitate a pre-hearing session to attempt to soothe ill feelings and reach understandings on the optimal outcome of an entitlement process. Since this approach is far more affordable to citizens than hiring counsel or another land-planning expert to oppose the developer’s legal staff at serial formal hearings, citizen opponents of an entitlement proposal have incentives to engage in mediation. A second advantage of citizen engagement is the opportunity to share and organize their collective thoughts and, through making acquaintances, perhaps, to organize opposition tactics and logistics.

Likewise, a developer gains advantage in submitting to a consultative session with other stakeholders. Viewed most cynically, one developer opportunity is to learn meritorious arguments against the development proposal, or citizen counter-proposals for mitigating its negative impacts, prior to the public hearing date. A second opportunity is that the developer can avow to the land use staff and elected officials that its representatives “sought to accommodate” the surrounding neighbors, taking credit for flexibility. On occasion, however, the developer may discover wisdom among its project’s opponents and learn that its own team’s silence (or its lack of communications skills) stymied messaging that, properly managed, could have made a project proposal acceptable to opponents. Finally, consultation allows a developer to keep the conflict (and accompanying negative vibe) sheltered from social-media headwinds, providing that the proponent stays ahead of controversy promptly upon learning of earnest opposition, negotiates in good faith, and reaches a palatable resolution with opponents prior to the public hearings approving entitlements. The ancillary benefit for the developer is maintaining a respected place brand that will drive leasing, sales opportunities, and visitors to its development.

For law students to be prepared to assist the parties in land-use controversy mediation, basic preparation has two ingredients. Initially, a student should have completed the basic property course of study in her first year and an additional term in a land-

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35 See, e.g., id. at 175 (featuring in-hearing vilification of “greedy promotors, incompetent public servants and trouble-making neighbors.”).
use law course. Land-use courses are taught periodically in a large number of law schools nationally.\(^{36}\) Second, the students must have studied both two-party mediation and elements of mediation in the group-dynamics process. One such technique involves the “mutual gains approach.”\(^{37}\) The mutual gains approach to tamping down stakeholders’ rhetorical level\(^{38}\) and ameliorating land use disputes is not a single process or strategy. It draws from negotiation, consensus building, collaborative problem-solving, alternative dispute resolution, public participation, and public administration. The result is inclusive, collaborative processes designed to explore stakeholders’ full range of interests and criteria, compare various alternatives to land-use outcomes, and determine which alternatives meet the most interests of participants.

Among other dimensions of a mutual gains approach:

- It is based on considering all stakeholders’ respective interests (as opposed to positions), as well as the necessary technical development information, such as a proposed project’s impact upon open space, economic development, and transportation;
- It involves stakeholders, along with appointed and elected decision makers, such as planning staff members and officials, and members of zoning boards or city councils;
- It generates information for better understanding the stakeholders’ interests and determining if some of those interests are shared;
- It requires application of the neutrals’ public engagement skills along with their mediation skills; and
- It engages the public and the developer in dialogues beyond merely expressing information and views while skirting solution-building.\(^{39}\)

The law student’s role in the clinic evolves during three stages. The first stage is preparation, while the second is engagement, and


\(^{37}\) See generally NOLON, supra note 20. Of course, “mutual gains” is not the neutral’s sole solution to successful land use controversy mediation; but a tested and rational template approach enables the student to learn front-to-back (a) mediation facilitation while discovering which elements of facilitation require her most continued study and (b) application, to enable her to become an effective out-of-court dispute-resolver.

\(^{38}\) See SUSSKIND & FIELD, supra note 7, at 153, 178; see Part II, supra (illustrating distortions and “ideologies”).

\(^{39}\) NOLON, supra note 20, at 11; see SUSSKIND & FIELD, supra note 7, at 37–42; Lawrence Susskind, *Resolving Disputes the Kinder, Gentler Way*, 61 PLAN. 16, 16 (1995).
the third is reflection. In the first stage, the student neutrals would meet with the town’s planning staff in order to understand better the technical aspects of an application. The students must learn facts about the following topics: what is the specific project request? How does the request compare to the existing use of the land? Under the current zoning, what is the most intensive use of the land available, and how does that contrast with the proposed use? Under the proposed zoning or zoning adjustment, what is the most intensive use of the land, how does that contrast with the intensity of the proposed use? What are the new or augmented negative potential impacts of the use proposed (if approved); and how likely are each of those impacts actually to occur affecting open space, transportation, jobs creation, and quality of life generally in the surrounding area? Such preparation enables students to feel confident in engaging with stakeholders; the latter is less likely, in turn, to dismiss the students’ efforts due to their utter lack of knowledge or experience. The students also prepare by familiarizing themselves with the ranges of perspectives described above in the realm of each camp. Realizing that she had “heard that before” buffers the student neutral against the shock of hearing for the first time something especially strident or un-civil from a consultation’s participant.

In the second stage, the students engage with the stakeholders in consultations.40 Tasks involved here include: filling gaps in stakeholders’ knowledge with accurate technical information; inventorying concerns of the opponents (and counter-concerns of the proponent developer about the cost of mitigating opponent concerns); directing citizen research on the bona fides of these interests (that is, plumbing their genuine existence and the costs attending their consequences); inventorying the sorts of mitigation approaches the developer might implement to ameliorate the opponents’ concerns; urging all stakeholders to press forward toward a tolerable resolution on each issue involved in the zoning matter until options are chosen meeting shared interests or identifying where stakeholders must agree to disagree; and, finally, documenting agreements reached by the participants, allowing concessions on both sides to be incorporated into the public record of the forthcoming hearing. Indeed, developer promises may even be in-

40 Deliberations themselves feature three phases, according to Nolos, supra note 20, at 17–18.
corporated in a community benefits agreement\textsuperscript{41} between the neighbor stakeholders and the development enterprise, which the clinic may aid in drafting.

The third stage is post-mediation student reflection, taking into account these queries:

A. How, if at all, can therapeutic jurisprudence affect an entitlement hearing’s tone, both to reduce the intensity of stakeholder hostility and negative rhetoric, and to render outcomes of zoning processes more “palatable,” thereby sustaining, if not improving, the behavioral health of the neighborhood’s residents and the developer’s principals alike?

B. What additional sorts of counseling agencies or bodies would most effectively accomplish your answer to A.? Would a semi-private specialist court or arbitral panel hearing zoning applications provide a viable option to the \textit{ad hoc} nature of a consultation?

C. What sorts of processes and protocols are most successfully employed in a neutral’s quest to educate and to ameliorate tensions and pent-up, lingering hostilities among stakeholders, and to address shared interests in ways that may produce stable, wise, and fair outcomes? As part of this inquiry, which processes best created value by creating theretofore uncontemplated solutions meeting shared interests, effectively “expanding the pie” to the benefit of all stakeholders?\textsuperscript{42}

D. After counseling the stakeholders in the entitlement matter, do you believe you had any community impact, and, if so, how would you describe that impact? If your answer is “no, there was no discernable impact,” how might you turn your response in an affirmative direction?

V. WHAT THE LAW SCHOOL’S ADVOCATES MUST CONTRIBUTE

For a land-use consultation clinic to succeed, all parties engaged with the law school must contribute. No matter their role in the school, every employee must mention to their neighbors and

\textsuperscript{41} See, e.g., Vicki Been, \textit{Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?}, 77 U. CHI. L. REV. 5, 6–7 (2009).

\textsuperscript{42} See Susskind & Field, supra note 7, at 28; Nolon, supra note 20, at 20; Widener, supra note 27, at 121–28.
other university employees the availability of neighbor-developer consultation services through the clinic. Here are the other roles the professional staff must play in advancing the clinic.

A. The Clinician

The clinician does what she does best—teaching by demonstration. Among the elements demonstrated are: working in teams, problem-solving, listening, drafting of agreements and ordinances, informing clients, and persuasion in collaborative settings.\(^{43}\) Perhaps the single most important lesson the clinician can teach student mediators is the virtue of paying attention. Academics and practitioners alike have informed the academy that the art of active listening is a vital lawyering skill in short supply, in negotiations and otherwise.\(^{44}\) Second, one should understand that listening not only leads to heightened empathy, but further, is critical to understanding sentiments and thoughts underlying statements overtly communicated.\(^{45}\) And finally, the discipline of paying complete attention to anything extraneous, a virtue diminishing across the bandwidth of society, must be mastered.\(^{46}\) Professor Edmundson brilliantly summarizes absorption’s benefits:

Happiness is losing yourself in something that you love and that will also, in all probability, come to benefit others. Happiness is working in an honorable vocation. Happiness is helping others,

\(^{43}\) See Salkin & Nolon, supra note 36, at 543.


\(^{45}\) See Evelyne Schwaber, Empathy: A Mode of Analytic Listening, in EMPATHY II 144 (Joseph D. Lichtenberg, Melvin Bornstein & Donald Silver eds., 2014).

\(^{46}\) See Mark Edmundson, Pay Attention!, HEDGEHOG REV. (2014), http://www.iasc-culture.org/THR/THR_article_2014_Summer_Edmundson.php. Recent research indicates that greater frequency of “compassion meditation” practice (a form of focus) is related to reductions in mind-wandering to unpleasant topics and increases in mind-wandering to pleasant topics—and both circumstances relate to increases in caring behaviors (compassion) towards oneself and others, a therapeutic outcome. See Hooria Jazaieri, et al., A Wandering Mind is a Less Caring Mind: Daily Experience Sampling during Compassion Meditation Training, 11 J. POSITIVE PSYCHOL. 37, 9–11 (2016).
or protecting others, or enhancing the stock of humane knowledge. Happiness is absorption . . . . To be absorbed is to intensify one’s connection with what is real with the hope of reshaping it for the better, if ever so slightly.  

Next, since partnering with planning staff in the various jurisdictions the clinic serves is beneficial, the clinician has additional educating to do by melding efforts of the planning staff member(s) and the students. One aspect of that is trust-building between them. Either constituency may think the other has an agenda; and the clinician must assure them that they can rely on each other for correct information flow, honest assessments of facts, and their best judgments. The clinician will also encourage the town’s planning staff member to think creatively, a trait not native to all persons trained and paid to rely on codes, related official interpretations, and the “conventional wisdom” surrounding planning principles. The key is to convey to fledgling neutrals that communities have more than “zero-sum” outcomes to consider—that multiple choices of how to resolve public controversies exist.

The clinician must also assure the students that the leadership required in facilitation methods, like a mutual gains approach, does not depend upon always knowing what to do in the circumstances. Facilitation is more geared toward sharing information, listening attentively to others and learning from information gained. These skills are not native or rapidly acquired but can be learned—by students already conditioned to learn. They should

47 See Edmundson, supra note 46. Happiness indubitably is therapeutic. When we smile, the brain releases dopamine, a neurotransmitter that produces feelings of happiness. Reflexively, the release of dopamine when we feel happy causes us to smile, and that act of smiling causes the brain to release additional dopamine that makes us feel happy. See Kaitlin McLean, Can Laughter be Therapeutic?, YALE SCI. (May 12, 2011, 2:54 PM), http://www.yalescientific.org/2011/05/can-laughter-be-therapeutic/.

48 See Susskind, supra note 39, at 16. Of course, planners (including Susskind, long ago) themselves can become mediators, at least informally. See Joshua Abrams, The Zoning Dispute Whisperer: Adding Mediation to the Planner’s Toolkit, 77 PLAN. 20 (2011); John Forester, Planning in the Face of Conflict: Negotiation and Mediation Strategies in Local Land Use Regulation, 53 J. AM. PLAN. ASSOC. 303 (1987). They have some interest in the outcome, that is, retaining their jobs—the government they work for is an interested party. See id. at 303, 309. However, it is more sensible for them to serve in a co-conciliator’s role. See Adams, supra note 48.

49 See Widener, supra note 27, at 120.

50 See Susskind, supra note 39, at 16 (noting reliance on conventional behaviors can lead to erosion of public confidence in planning).

51 NOLON, supra note 20, at x, xiii.

52 See SUSSKIND & FIELD, supra note 7, at 230.

53 See id.
become absorbed in their studies, but also calmed by the idea that they need not acquire substantial technical expertise in land-use.

B. Doctrinal Faculty

The doctrinal faculty needs to be a resource to students, not only particularly in the areas of land-use and real property law, but also in ADR theory (I include here the principles of therapeutic jurisprudence), ethical conduct, and practice.54 If these faculty members have contacts in the development community where they live, it behooves them to speak enthusiastically about this available resource at their school. Also, they should maintain contacts among the town’s attorneys they taught during school; and the word of the clinic’s availability must be spread among these potential consumers of the clinic’s product.

C. Librarians

These professionals will be called on to source town zoning codes, model codes, and their respective written interpretations, along with collateral course materials55 on mediation and therapeutic jurisprudence.


55 Among other available resources are instructional videos posted on YouTube. See, e.g., Lawrence Susskind, Global Issues in Sustainable Development, Negotiating Sustainability (Lesson 7) (Feb. 17, 2016) (viewed on YouTube); Lawrence Susskind, Dealing with Angry People (Feb. 8, 2011) (viewed on YouTube). Susskind, an urban planning professor and an early (mid 1970s) proponent of mutual gains approaches to negotiation, launched a business, the Consensus Building Institute, promoting this group conflict-resolution method. Podcasts and other media resources dealing with many aspects of mediation and land use conflict resolution are available;
tic jurisprudence. Crucial ingredients of successful mediation are fact-gathering and, where possible, agreeing on the significance of facts. Consequently, aggregating facts on a zoning matter from reliable sources is a valued role of the librarian that will explode in scope as big data saturates the public domain, such as populates frequently changing dynamic maps.56

D. The Dean’s Office

The administration’s members are crucial players in getting planning and zoning administrators, and their bosses, to refer cases to the clinic. They should inform each mayor, board of supervisors’ chair, and the chairs of regional planning and zoning boards about the clinic’s availability and its potential to streamline their zoning processes. This last item is the “hook.” The clinic’s value proposition to the town is its capacity to save everyone time.57 By “time,” I include reducing time consumed by stakeholders (and sometimes planning staff) lobbying legislators and listening to in-hearing testimony, and time saved in the pre-hearing narrowing of issues58 to those few essential decisions that require policy-making experience and judgment by local legislators. When the clinic is ready to display its capability, the Dean’s office must invite local authorities to visit the clinic to speak to the clinician about its processes, creating the opportunity for the school to make the pitch. The “pitch” promotes local authorities requiring disputants’ participation in one or more consultative sessions before any contested matter becomes a contentious, but unproductive, public hearing agenda item.59

but as this paper is not a bibliography, the author shall not further defile the law librarian’s domain.

57 See Abrams, supra note 48.
58 See id. Prof. Carol Rose believes that development proposals generating concrete disputes are those that local officials approach with greatest energy. See Rose, supra note 6, at 874–75.
59 NOLON, supra note 20, at 10–11. Local officials have encouraged mediation prior to adjudication. Indeed, in large scale or long-term development promising substantial changes to an enclave, it makes sense for stakeholders to sort out major roadblocks and concerns before the developer’s application is filed initially, to explore whether a superior development plan and a coalition of affected parties achieving compromise is attainable through the development of community trust and developer transparency. See id. at 12–13. But mediation may occur at any stage in the development review process (before or after the hearing is commenced), without violating legal constraints, so long as the process is structured properly and is completed before
other words, a town would make consultations in a contested application mandatory by regulation.\footnote{60}

One may expect skeptical reactions from some town politicians, along with inquiries as to why a law school clinic engages in a collaborative peacemaking process. Two underlying concerns may surface: ceding of control over the zoning process (something local officials at times are reluctant to do)\footnote{61} and concern over the quality of the conflict resolution’s guidance. The first concern is deftly resolved by the clinic according to a town’s leadership substantial credit for reaching solutions, and identifying contributions of appointed planning staff members participating in joint problem-solving on the local government’s behalf. The second concern is addressed by the clinic’s reporting favorable results and diminished public anger with local land use processes generally. Now, what obstacles impede obtaining these results?

VI. LAND USE DISPUTE RESOLUTION CLINIC HURDLES

Students maintaining everyday citizens’ dignity and animating social justice and civil discourse through a clinic vehicle, by itself, will not justify its establishment and maintenance. Sturdy challenges to a launch are described in this part. An initial hurdle is achieving supply-demand equilibrium; a dilemma addressed by responding to three intertwined inquiries. Firstly, a clinic must address whether it can secure a “stream” of land use controversies of suitable complexity levels and proper sequencing for student/staff neutrals. Next, it must address whether the clinic prepare its students rapidly but ably enough (before they graduate) to perform “solo” mediation or joint problem-solving work. Finally, it must

\footnote{60} This requirement essentially is institutionalized in some communities, as these towns anticipate neighbor concern and, sometimes, resistance. For instance, in Glendale, Arizona, applicants for land use entitlements are required to prepare a “Citizen Participation Plan” (CPP) prior to their public hearing date being scheduled. As this city’s manual explains, the purpose of the CPP “is to ensure that applicants pursue early and effective citizen participation in conjunction with their land use applications,” to have developers “work with applicants to resolve concerns at an early state of the process,” and to facilitate ongoing communication among the stakeholders. See Glendale Planning Department, Citizen Participation & Public Notification Manual, GLENDALEAZ 1 (Jun. 2012), https://www.glenendaleaz.com/planning/documents/CITIZENPARTICIPATIONANDPUBLICNOTIFICATIONMANUAL.pdf.

\footnote{61} See Bakken, supra note 7, at 246.
address how the clinic matches an incoming controversy’s complexity to the level of an available neutral’s expertise.

In many jurisdictions, student-manageable land-use disputes (featuring immediate but less-widespread project impacts) exceed in numbers major projects having complex controversies rooted in discordant values or ideologies.62 Contemplate the difference between “private nuisances” involving a development that abuts relatively few aggrieved neighbors with more “public” nuisances with geographically and demographically far-reaching implications arising from, for instance, a proposed master-planned, mixed-use community.63 Examples of less complex cases include intended expansions of non-conforming uses, smaller infill developments of modest proportions, conditional use permits, minor-scale variance requests, and single location liquor license applications.64 Performing a neutral’s role in these simpler cases affords a “capstone experience” to a second or third year law student who has completed classes in land-use law, negotiation, and mediation.65 The more

62 Abrams, supra note 48.
63 See, e.g., Keith H. Hirokawa, Property as Capture and Cure, 74 ALB. L. REV. 175, 198–201 (2010).
64 Admittedly, any of these facially “less contentious” matters can blow up on a mediator if opponents consist in whole or part (for example) of strident historic preservationists; persons seeking to maintain a neighborhood’s “community character” (thus, illustratively, disposed to dispute any change because it interferes with, for instance, their “equestrian way of life”) or of members of super-neighborhood associations encompassing square miles of land for resisting any new proposal not blessed in advance. If local regulation a portion of the lower airspace to be occupied by drones is forthcoming, the potential number of controversies is, so to speak, astronomical. See, e.g., Troy A. Rule, Drone Zoning, 96 N.C. L. REV. (forthcoming 2016); Michael N. Widener, Local Regulating of Drones in Lower Airspace, 22 BOST. U. J. L. SCI. & TECH. 239, 249-60 (2016). Professor Stephen R. Miller observed that one challenge for clinics is to identify land use controversies that, from inception to conclusion, are “manageable” within the period of a semester. See E-mail from Stephen R. Miller, Univ. Idaho, to the author (Mar. 3, 2016, 8:15 PM) (on file with author). But, no legal obstacles prevent a student concluding her clinic semester from ongoing service as a neutral with the stakeholders’ mutual consent. Such a student’s final reflection awaits the task’s completion, which is not the ideal clinician-feedback environment, but ultimately may prove more satisfying to the current or former student.

65 See Salkin & Nolon, supra note 33, at 548. These authors point also to the significance of learning use of new technologies in the planning field such as GPS systems. See id. at 526. In Seattle, a hearing examiner process involving independent appointed officials affords an appellant the opportunity to mediate her dispute by so stipulating with the Hearing Examiner and the other party at a discretionary prehearing conference. See Sue A. Tanner, Public Guide to Appeals and Hearings Before the Hearing Examiner, SEATTLE GOV’T, 5–6 (Apr. 23, 2014), http://www.seattle.gov/examiner/docs/Public-Guide-Revised-2016.pdf. Seattle’s Hearing Examiner has a wide range of municipal matters in her appellate portfolio. See id. at 15–16 (showing numbers dealing with land use-related controversies worthy of potential law student mediation). Mediation is endorsed by the Hearing Examiner’s Office. See Office of Hearing Examiner, Mediation Program, SEATTLE GOV’T, http://www.seattle.gov/examiner/mediation.htm.
complex cases afford opportunities for clinicians or student mentor demonstrations to the clinic’s students, or for recent law graduates (or law school fellows) sharpening the neutral’s collaborative problem-solving skills.

Growing the base of prospective neutrals among the student population is an opportunity for creative recruitment. In the short term, sources of prospective neutrals include advanced students in joint-degree law and urban planning or environmental studies programs, and new lawyers employed in school-sponsored legal incubators and fellowship programs.66 A pro bono commitment to serve as a neutral in a certain volume of cases can be part of these new lawyers’ firm or fellowship contracts.67 Bringing these participants up to speed in short order implicates crash courses through a series of audio and video materials provided online or mentoring via one of the American Inns of Court chapters, both of which are achievable low-cost approaches.68

For longer-term momentum in building up the neutral stable, clinicians may lobby their academic deans to bundle ADR, negotiation skills, Therapeutic Jurisprudence, environmental/natural resources, and land-use law courses into a Public Controversy Resolution “track” or “certificate program” (PCR) at the school, with the student neutral’s handling a land-use dispute being her capstone course final assignment. One endeavor engaging students in this track is to promote their enrolling in a short seminar (approximately five weeks long) during the second semester of the student’s first year of law school, fulfilling a single credit. This seminar ideally should touch on elements of all courses offered in the full PCR program, taught broadly by clinicians and expert guest

67 See Davida Finger, The Pro Bono Requirement in Incubator Programs: A Reflection on Structuring Pro Bono Work for Program Attorneys, 1 J. EXPERIENTIAL LEARNING 229, 231 (2015) (stating that 23 of 39 incubator or residency programs listed in an ABA directory require program attorneys to do pro bono work).
speakers, thereby inducing student registration in full-term courses after completion of their first year curriculum.

Financing clinic operations, though not invariably required, clinics are most favored by law school administrators when they self-pay or have substantial funding sources. Where will financing come from for such a clinic? The optimistic view that a private benefactor’s donations or foundation grants will underwrite a clinic is often unrealized.\(^6^9\) In a major university setting, however, a law clinic may partner with an urban planning or public administration school unit elsewhere on campus, an alliance sharing resources, including clinic operation budgets, especially under a dual-degree program.\(^7^0\)

Ultimately, newer clinics of this type will need to charge fees for conflict-resolution services. What is the value proposition spurring adversaries to seek services from a law school clinic? Initially, mediation, joint fact-finding or problem-solving facilitation will occur if cities, towns, and counties mandate one or more of these activities in all contested land use entitlement applications. Even when the Planning Director, Zoning Administrator, or another administrator of the zoning apparatus is charged with “in-house” conflict resolution,\(^7^1\) these efforts may not bear fruit. The staff member mediates in an environment that frequently affords little preparation time; thus, she neither has an opportunity to verify asserted facts and positions, or to consider the impacts of what the disputants present.\(^7^2\) Additionally, if opponents of a project perceive the administrator’s bias favoring the development commu-

\(^{69}\) Among possible benefactors are zoning and environmental law firms and organizations promoting civil discourse in public life, a core ambition of this type of clinic. One organization committed to the advancement of civil discourse is the Sandra Day O’Connor Institute in Phoenix, envisioning that “policy decisions affecting our future are made through a process of civil discussion, critical analysis of facts and informed participation of all citizens.” See Our Vision, SANDRA DAY O’CONNOR INSTITUTE, http://www.oconnorhouse.org/about/mission.php. That institute has a Fellowship program for select graduate students. See id. The Stegner Center’s Environmental Dispute Resolution Program at the S.J. Quinney College of Law is funded by a multi-year grant from Alternative Visions Fund, part of the Chicago Community Trust. See Environmental Dispute Resolution Program, S.J. QUINTNEY C. OF L., http://www.law.utah.edu/projects/edr/.

\(^{70}\) See, e.g., a dual-degree program sponsored jointly at the University of North Carolina, Chapel Hill, by the School of Law and the Department of City and Regional Planning, under which students may pursue the J.D. and M.C.R.P. degrees together and, with concurrent enrollment, may obtain the two degrees in four years. See Law & Planning, DEPT OF CITY & REGIONAL PLANNING, https://planning.unc.edu/academics/masters/dualdegrees/lawplanning.

\(^{71}\) See Abrams, supra note 48; Michael N. Widener, Shared Spatial Regulating in Sharing Economy Districts, 46 SETON HALL L. REV. 111, 182 (2015).

\(^{72}\) See Forester, supra note 48, at 303.
nity, or if the conflict resolution caseload becomes overwhelming, the zoning bureaucracy advances by periodically loaning an employee to the school’s clinic as an advisor or a co-neutral contrasted with conflict resolution becoming multiple city employees’ primary stock in trade. This time commitment raises budgetary issues while enhancing personal discomfort, especially in the inexperienced or passive planner’s situation.

Second, alternatives to consultation are more costly, often by a wide margin. Consider a developer’s choices. First, they can pay attorneys or lobbyists by the hour, sometimes many hundreds of dollars per hour (or the equivalent under a fixed fee arrangement). Hours are expended in lobbying planning commissioners initially and, second, council members in a rezoning—or members of boards of adjustment, where variance or special exception cases are involved. In any such instance, staff members of the zoning bureaucracy must be repeatedly met with to provide facts and other inputs, such as assurances of future development performance. These meetings and preparations for them raise the developer’s project “soft costs” substantially, compared to costs of group problem-solving exercises that resolve outstanding controversies or at least narrow the issues in their number and complexity. The costs of litigation if a lawsuit follows the outcome of a hearing body’s decision also stings. The sensible developer acknowledges that occasional unproductive attempts at dispute resolution are cost-effective if any of these exercises narrows the scope and magnitude of objections, leading to outcomes that reduce friction in future neighborhood or community relations.

73 Cf. id. at 307 (citing planning director’s perspectives that developers and their attorneys are earlier to meet with as they are familiar, speak a common language with the planner and share technical know-how whereas neighbors are inconsistent in their points of view and lack understanding of the process). Forester, supra note 22, at 447 (noting that residents also doubt the good intentions of planners at times).

74 Further, zoning bureaucrats prefer avoiding becoming material witnesses in later litigation over an allegedly broken, negotiated zoning bargain. See, e.g., Lake County Trust Co. v. Advisory Plan Commission, 904 N.E. 2d 1274, 1275–79 (Ind. 2009).

75 In complex cases, rezoning and zoning adjustment and modifications to the town’s master (or general) plan are implicated, as are rights-of-way abandonments, historic preservation approvals, subdivision changes, sign code approvals, design review and so on—and each process in controversy may involve persuading the town’s legislative body (final appeals) and/or a board’s or commission’s members, as well as town staff members. This explains why zoning-practice law partners earn enough to help in underwriting salaries of land use clinics’ fellows. See supra note 64.

76 Consider the illustration in Chris Coppola, Tempe Apartment Plan Shows Divide in Vision, ARIZ. REP., Apr. 13, 2006, at 14A. Some Tempe neighbors are convinced that traffic will choke down flow in the vicinity. See id. at 20A. But suppose the subject developer during a
Third, hidden value lies in less mediator experience. Private mediation of land-use disputes by well-seasoned mediators may be less therapeutic than a clinic-led consultation. Besides higher costs of private mediation (borne by someone), when the mediator is more experienced, consultative proceedings will likely be less spontaneous because they are less messy. An articulate neutral-in-training remains less rehearsed (unsaturated with the jargon and style of the professional’s resolution-process preferences), thereby exhibiting rougher edges. These very traits can be disarming, causing stakeholders to relax earlier in the flow of the consultation, causing disputants to divulge viewpoints instead of withholding them, leading in turn to rapidly identifying shared interests among the opponents. Developer representatives, perhaps identifying less with a student neutral than with a specialist, may express less impatience with the mediation or other consultation and may minimize attempts to “score points,” as is customary with a professional neutral.77

Market prices for clinic services must vary according to the complexity of a land-use contest engagement, its geographic location and the number of disputants and “sides” imbedded in the controversy. A clinician’s or a clinic-volunteer affiliate’s management of the consultation will likely result in increased expense. A fixed per diem fee, so long as the consultation’s duration is not utterly unknowable, lends predictability and greater comfort to the consultation agrees that it will not provide more than one parking stall per dwelling unit? The resulting project still will add traffic to the existing neighborhood, but the project’s implicit message to potential renters emphasizes a walkable and bike-able lifestyle relying on mass transit and personal-effort usage. The neighbor’s anxiety over street gridlock is alleviated, the city reduces its overall traffic burden and the developer can appeal to trendier and healthier dwellers who will pay a small premium to engage in such a lifestyle. The stakeholders have taken that concern from their list of troubles; and the developer’s rent revenue may increase. If the idea is raised, that is; and ideas-generation first requires a dialog among those stakeholders to ensue.

77 But, the student’s inexperience could embolden an obstreperous negotiator with a non-therapeutic outlook on life or negotiating, a fact teachable by the clinician to students, along with addressing advocate behavioral problems. Cf. Widener, supra note 27, at 116–19. Experienced developers have negotiated with public bodies over numbers of projects in many realms, including development agreements, planned unit developments, floating zones and even zoning adjustment applications. See Stewart E. Sterk, Structural Obstacles to Settlement of Land Use Disputes, 91 BOST. U. L. REV. 227, 251 (2011). One means to limit “exploiting inexperience” is co-mediation, an opportunity for the less experienced mediator to gain experience and confidence in a more protective environment shared with her seasoned fellow mediator. See DAVID SPENCER & MICHAEL BROGAN, MEDIATION LAW AND PRACTICE 75–77 (2006). Another professionals’ dominance blunting approach implements a “circle process.” See Larry Chartrand, The Appropriateness of the Lawyer as Advocate in Contemporary Aboriginal Justice Initiatives, 33 ALBERTA L. REV. 874, 876 (1995).
paying parties. The clinic should impress a minimum charge for opening the proceeding (since the neutral presumably foregoes other engagements). In simpler cases such as zoning adjustment cases having few stakeholders, half-day and full-day fixed charges, carefully priced, should capture sufficient streams of revenue to sustain the clinic, if the influx of disputes is steady. Periodic comparison shopping by clinic directors against market prices of private mediators of varying experience levels seems in order.\textsuperscript{78}

The neutral’s costs should rest primarily on the development side of the land-use dispute for this reason. If most developers interacted early in the application process with proximate neighbors, using finesse, such as according dignity to the neighborhood representatives by conceding imperfections in their proposals and making affordable modifications, the major bases to oppose a project will often evaporate before the initial hearing on the application. In those instances, a town planning or zoning employee can intermediate those opponents’ remaining points, achieving a mutually satisfactory conclusion. Hostility of affected residents too often results from the developer’s inattention to or disrespect for the neighbors’ positions. When that occurs, the developer’s financial burden of clinic consultation is properly viewed as liquidated damages assessed for poor advance planning or intentional “cloaking” of the development plan from prospective opponents. Still, opponents must have “skin in the game.” Neighbor posturing for outright denial of a project, seeking interminable delays in hearings or demanding unreasonable developer concessions, and wasting of the neutral’s time otherwise, will be minimized when opponent’s share of the consultation’s price tag accompanies such tactics. Collecting the developer’s share of the consultation fee concurrently with the town’s initial acceptance of the development application is reasonable, with the neighbor’s share to be paid prior to the consultation date.

Identifying qualified clinicians is hampered by an historic imbalance in the American law school curriculum.\textsuperscript{79} Land-use law engages students who often do not intend to pursue a litigator’s career aside from appellate practice or eminent domain representations. Recently, accrediting bodies have made it clear that a curriculum’s litigation focus needs greater balance with non-litigation

\textsuperscript{78} Caution is indicated. Shoppers should intuit those bases for price differences, applying the analog of receiving treatment from an intern versus an attending physician.

skills acquisition. A sizable roster of persons having land use controversy resolution backgrounds with deep neutral’s consultation experience does not exist, especially within the multiparty-dynamics resolution arena. Newly-minted clinicians may seek training from proprietary providers like the Consensus Building Institute or the Straus Dispute Resolution Institute, from independent experienced practitioners, or from faculties of those urban planning and law schools immersed in land-related clinical mediation programs, such as those found at Pace University and the University of Utah.

VII. Conclusion

Law school clinics focus on a town’s underserved population with modest means or those enduring neglect, abuse, or other deprivation. While neighbors impacted by zoning matters own or rent residential property, they usually cannot afford legal advocacy in protracted administrative oppositions to proposed or approved (but as yet unbuilt) developments. Quite frequently, these persons’ voices in the land-use entitlement process are silent—yet, they have relatively more to lose. Among other results, they may be displaced during gentrification of a neighborhood or redevelopment of their enclave through an improvement or redevelopment district, or have a highly-incompatible new use or mixture of uses adjoining their homes. Possible negative impacts from a new or renovated project include increased local traffic, loss of curbside

80 See ABA Standard 302(a) (4) (2004) (requiring that “students receive substantial instruction in other professional skills generally regarded as necessary for effective and responsible participation in the legal profession.”). Interpretation 302-2 states that: “Trial and appellate advocacy, alternative methods of dispute resolution, counseling, interviewing, negotiating, problem solving, factual investigation, . . . are among instruction in professional skills fulfilling Standard 302 (a) (4).” Id.

81 Readers should note that while dispute resolution approaches are emphasized in these schools, their programs do not, as of mid-2016, engage students as neutrals. See Environmental Dispute Resolution Program, S.J. Quinney C. of L., http://www.law.utah.edu/projects/edr/ (“EDRP is available to ‘do the work’ of environmental dispute resolution for select projects. Services available include conflict assessment, process design, and mediation/facilitation. As appropriate, clinical students have the opportunity to assist the professional neutral in these cases.”). The Land Use Law Center at Pace University provides a four-day dispute resolution program for town leaders emphasizing mediation, facilitation and community decision-making skills, but apparently does not engage Pace’s students in that course nor in mediations of actual controversies. See Student Involvement, Land Use L. Ctr., http://law.pace.edu/student-involvement-0. This summary is not offered as critique, rather, to acknowledge that this proposal for law students to act as land use controversy neutrals envisions uncharted territory.
parking, or sacrifice of familiar open space or other walkable areas due to unwelcome improvements. Even if a properly conducted consultation’s outcomes are seemingly uneventful, some citizens will feel that the neutral offered them the chance to freely communicate their grievances in a group setting in which attention is paid to their issues. An occasional joint problem-solving session even may produce an apology,\(^{82}\) itself a highly therapeutic message.\(^{83}\) The argument that a public controversy resolution clinic will not aid or succor unserved citizens is baseless.

A second advantage will be the student participants’ growth as citizens,\(^ {84}\) through increasingly understanding plights of those somehow dispossessed by project development via loss of property value, changes in their former living environments, or simply disruption in their daily habits of engaging in the street life of their enclaves. A citizen’s perspective, tempered by the neutral’s vantage point, enhances the student’s desire to pursue social justice\(^ {85}\) and property rights\(^ {86}\) in the student’s town, not strictly as a lawyer,

\(^{82}\) See Susskind, supra note 39, at 16.

\(^{83}\) See, e.g., Daicoff, supra note 3, at 159 (noting that the therapeutic benefits of apology and forgiveness are valuable considerations for those operating as creative problem-solvers seeking a more comprehensively satisfactory outcome to the problem-solving exercise); Michael B. Rainey, Kit Chan & Judith Begin, Characterized by Conciliation: Here’s How Business Can Use Apology to Diffuse Litigation, 26 ALTERNATIVES TO HIGH COST LITIG. 131, 134 (2008). With sufficient mutual intention to behave both humbly and practically, several neighbors’ or developers’ grievances could dissolve at this mediation stage.

\(^{84}\) Cf. Erik J. Stock, This Land is Our Land: Proposing a Mediative Model for Public-Private Land Use Disputes, MAYHEW-HITE REP. DISPUTE RES. & COURTS (2006–2007), http://moritzlaw.osu.edu/epub/mayhew-hite/vo5iss2/student.html#_ednref38 (noting that land use decisions are more localized than other public acts and engage neighbors invested in long-term community relationships); Madelyn Nelson, Students on the Law: Active Citizenship Goes Beyond Memorization, LIFE OF THE L. (2013), http://www.lifeofthelaw.org/2013/09/students-on-the-law-active-citizenship-goes-beyond-memorization/ (noting that a college student who understood her citizenship as the manner of her relating to her community, under the community-based conception of citizenship).

\(^{85}\) Views of the “just society” abound, but an inspiring version is Michael Sandel’s: “To achieve a just society we have to reason together about the meaning of the good life, and to create a public culture hospitable to the disagreements that will inevitably arise.” MICHAEL J. SANDEL, JUSTICE: WHAT’S THE RIGHT THING TO DO? 261 (2009). Sandel observes that instead of avoiding the moral convictions of our fellow citizens, “we should attend to them more directly—sometimes by challenging and contesting them, sometimes by listening to and learning from them.” Id. at 268.

\(^{86}\) I include here property rights possessed by developers, one stakeholder not invariably on the “wrong” side of consultations about optimal land use policies. Some argue that application-by-zoning application party bargaining has substantial negative consequences. See, e.g., Roderick M. Hills, Jr. & David Schleicher, Planning an Affordable City, 101 IOWA L. REV. 91, 95, 118–24 (2015) (noting that in a by-the-parcel bargaining system, outside developers must hire well-connected zoning “fixers” who lubricate the zoning approval process, but such costly activi-
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but also as a communicator, peacemaker, and purveyor of therapeu-
tic jurisprudence to adjacent neighbors and the larger com-

munity. On the coin’s verso, someone training in the law merely

explaining entitlements’ processes and roles of the actors engaged

in them may profoundly affect persons feeling that no one con-

nected to that process knows their points of view or, in any event,

heeds their expression. In Professor Wexler’s words, “what legal

actors do has an impact on the psychological well-being or emo-
tional life of persons affected by the law.”

Therefore, promoting deliberative dialogue, civil discourse, and therapeutic conflict bar-
gaining, through a clinic preparing law students as future neutrals
in community land-use controversies, is ripe for law school curricu-

lum integration.

VIII. Lexicon

Consultation: A meeting moderated by a neutral in which stake-
holders’ positions are negotiated or formally discussed until reach-
ing either an impasse or a resolution. These talks feature civil
discourse; and they include, variously, joint fact-finding, problem
solving, mediation, and other forms of bargaining and revealing of
shared interests (if any) among the adversaries.

Land-use: The variety of elements of organization of, and processes
for maintaining, a town’s physical layout and uses; they include
general (or master) plans, rights-of-way dedications and abandon-
ments, historic preservation, building design and sustainability, site
planning and zoning (including rezoning cases and zoning adjust-
ment matters), and subdivision plats and amendments.

Neutral: A person who organizes and moderates a consultation,
playing no advocacy role other than urging the participants to use
civil discourse and, where possible, to reach an understanding and

ties add to the price of new housing and delay its construction while deterring other outsiders
from proposing new housing construction at all). Others hold that a recent trend to greater
flexibility in planning encourages an exchange of benefits, where the developer is invited to
make concessions regarding its development; so that zoning regulations serve as a baseline rights
allocation against which bargaining with the local regulators is the norm. See Ryan, supra note
2, at 348–51. In any event, when neutrals calm the waters in advance of escalating hostilities,
however, developers may avoid the costs of “fixation.”

87 See Wexler, supra note 4, at 126.
perhaps tangible outcomes. The neutral may be a student, a fellow (post-law school or urban planning graduate), a clinic volunteer in law practice, or a clinician.

Town: A political unit for land use purposes with a deliberative body. “Town,” as used in the paper, includes cities, villages, boroughs, burgs, wards, counties, parishes, and all manner of special districts such as school districts, regional transportation authorities, utilities’ districts, water and sewer districts, community facilities’ districts and special assessment and taxing districts to the extent these are local (i.e., not state agency) bodies reaching a land-use decision.

Zoning code: The specific codified recipe for a tract’s use and operation, which typically includes a narrative ordinance and a map, along with written zoning code interpretations.

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88 This definition may vary depending on method; Charles Craver observes in his paper that the transformative mediator “intervenes,” identifying for parties their points of bargaining leverage. Craver, supra note 54, at 240.